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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**SOUTHERN DIVISION**

IN RE STEC, INC. SECURITIES  
LITIGATION

No. SACV 09-01304-JVS (MLGx)

This Document Relates To:

ALL ACTIONS

**REPLY MEMORANDUM OF LAW IN  
FURTHER SUPPORT OF CLASS  
REPRESENTATIVES' RENEWED  
UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Hearing Date: February 11, 2013

Time: 1:30 p.m.

Judge: Honorable James V. Selna

Courtroom: 10C

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**I. PRELIMINARY STATEMENT**

Lead Plaintiff State of New Jersey, Department of Treasury, Division of Investment (“New Jersey” or “Lead Plaintiff”), representative plaintiffs International Brotherhood of Electrical Workers, Local 103 (“Local 103”), Norfolk County Retirement System (“Norfolk County” and, together with Lead Plaintiff, “Plaintiffs”) and plaintiff Dr. Mark V. Ripperda (collectively with Plaintiffs, the “Class Representatives”) respectfully submit this reply memorandum of points and authorities in further support of their motion for preliminary approval of the proposed settlement (the “Settlement”) of the above-captioned action (the “Action”).

In its November 9, 2012 Order regarding preliminary approval of the Settlement, the Court granted Plaintiffs leave to amend their pleading in order to show that Dr. Ripperda has standing to assert claims under the Securities Act of 1933 (the “Securities Act Claims”) on behalf of himself and those Class Members who also have such claims (the “Securities Act Claimants”), thereby establishing that Dr. Ripperda’s claims are “typical” of those of the Securities Act Claimants under Fed. R. Civ. P. 23(a)(3). *See* ECF No. 346 at 13. Accordingly, on December 14, 2012, the Class Representatives filed the operative complaint (the “Third Amended Complaint”), which asserts the Securities Act Claims with Dr. Ripperda as the proposed Class Representative for those claims. *See* ECF No. 356 ¶¶ 25, 356-410.<sup>1</sup>

The Court further requested that the Class Representatives provide certain additional information in order to establish that Dr. Ripperda and his counsel “will fairly and adequately protect the interests” of the Securities Act Claimants under Fed. R. Civ. P. 23(a)(4), including facts “showing that Ripperda and his counsel are able to prosecute the [Securities Act Claims] vigorously” and “information

<sup>1</sup> Defendants stipulated to Plaintiffs’ filing of the Third Amended Complaint. *See* ECF No. 350.



1 regarding their efforts to negotiate the allocation of the [Securities Act Claims]  
2 from the net settlement fund.” ECF No. 346 at 12. Accordingly, the Class  
3 Representatives provided the Court with additional information detailing the Class  
4 Representatives’ “vigorous prosecution” of the Securities Act Claims, *see* ECF No.  
5 353 at 10-12, and the Plan of Allocation negotiations between Dr. Ripperda’s  
6 counsel and Co-Lead Counsel under the auspices of a former United States District  
7 Court Judge, the Honorable Layn R. Phillips, *see id.* at 6-7, 12-14.

8       Only one objection to the Settlement has been filed, by the West Virginia  
9 Laborers’ Pension Trust Fund (“West Virginia”), which is the plaintiff in a putative  
10 class action asserting the Securities Act Claims in a California state court action,  
11 styled *West Virginia Laborers Trust Fund v. STEC, Inc., et al.*, Case No. 30-2011-  
12 00489022-CU-SL-CXC (Cal. Super. Ct. Orange Cnty.) (the “State Action”). West  
13 Virginia has never been appointed as a class representative or moved for class  
14 certification in the State Action.

15       Significantly, West Virginia does not challenge the adequacy of the amount  
16 of the Settlement. Rather, West Virginia challenges Dr. Ripperda’s adequacy as a  
17 class representative for the Securities Act Claimants and the manner in which the  
18 Settlement is allocated between 1) the Securities Act Claimants and 2) Class  
19 Members who have claims only under the Securities Exchange Act of 1934 (the  
20 “Exchange Act Claimants”). *See generally* ECF No. 358 (“W.Va.Br.”).

21       However, as discussed in Section III(A), *infra*, the Plan of Allocation is  
22 reasonable because, *inter alia*, the 25% premium that it awards to the Securities  
23 Act Claimants is justified by both expert analysis and precedent that West Virginia  
24 does not even acknowledge. In addition, as discussed in Sections III(B)-(E), *infra*,  
25 the Class Representatives have established Dr. Ripperda’s adequacy, and the  
26 propriety of releasing the Securities Act Claims in connection with the Settlement.

27       Finally, as discussed in Section III(F), *infra*, the Class Representatives have  
28 submitted herewith a revised proposed class settlement notice (the “Notice”) in



1 order to provide additional information to Class Members regarding the requests  
2 for awards of attorneys' fees and expenses that both the Class Representatives'  
3 counsel and former lead counsel intend to submit for this Court's approval.

4 Thus, the Court should reject West Virginia's objection.<sup>2</sup>

## 5 **II. RELEVANT BACKGROUND**

### 6 **A. Former Lead Plaintiffs Did Not Assert Securities Act Claims**

7 On February 8, 2010, this Court appointed Arman Rashtchi and Keith A.  
8 Ovitt as lead plaintiffs and appointed Kahn Swick & Foti, LLC ("KSF") and  
9 Bernstein Litowitz Berger & Grossmann LLP ("BLBG") as co-lead counsel in this  
10 Action. *See* ECF No. 61. On April 9, 2010, KSF and BLBG filed a consolidated  
11 class action complaint (the "Consolidated Complaint"), which asserted only  
12 Exchange Act claims and not any Securities Act claims. *See* ECF No. 83.

13 Because the Consolidated Complaint significantly expanded the alleged  
14 class period, the Court re-opened the lead plaintiff appointment process in this  
15 Action. *See* ECF No. 123. On July 14, 2010, the Court issued an Order appointing  
16 New Jersey as Lead Plaintiff. *Id.* Rashtchi and Ovitt requested that the Court  
17 certify that Order for interlocutory appeal, to no avail. *See* ECF No. 135. On  
18 September 14, 2010, the Ninth Circuit denied Rashtchi and Ovitt's petition for  
19 mandamus on the lead plaintiff issue. *See* ECF No. 144.

### 20 **B. The Securities Act Claims Were First Asserted by New Jersey**

21 On August 13, 2010, Co-Lead Counsel filed an amended consolidated  
22 complaint (the "First Amended Complaint") on behalf of New Jersey. *See* ECF  
23 Nos. 131 & 131-1. The Amended Complaint was the first consolidated complaint  
24 filed in this Action that alleged any Securities Act claims.

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25  
26  
27 <sup>2</sup> West Virginia argues that "this is not the only court in this District that has  
28 refused to grant this Lead Counsel's motion for preliminary approval in a securities  
class action settlement." ECF No. 358 (W.Va.Br.) at 3 n.2. This is not the first  
time that West Virginia has made this oblique argument, *see* ECF No. 333 at 4,  
which the Class Representatives have already addressed, *see* ECF No. 335 at 8-9.

1 On January 10, 2011, the Court issued an Order granting Defendants'  
2 motions to dismiss the Amended Complaint, with leave to amend. *See* ECF No.  
3 175. Accordingly, on February 22, 2011, New Jersey filed the Second Amended  
4 Complaint, which also asserted Securities Act claims. *See* ECF No. 178 ¶¶ 304-69.  
5 On June 17, 2011, the Court issued an Order sustaining the Second Amended  
6 Complaint in significant part, but dismissing the alleged Securities Act claims for  
7 lack of standing. *See* ECF No. 200.

8 **C. West Virginia Strategically Filed Its Securities Act Claims in**  
9 **State Court and Actively Fought to Keep Them There**

10 On July 1, 2011, BLBG filed West Virginia's complaint in the State Action,<sup>3</sup>  
11 which alleges the same Securities Act claims as those alleged in the Second  
12 Amended Complaint,<sup>4</sup> as West Virginia itself later admitted in its opposition to a  
13 demurrer that was filed by certain defendants in the State Action:

14 Any challenge to the adequacy of the Complaint's falsity  
15 allegations would be misplaced. On June 17, 2011,  
16 United States District Judge James V. Selna for the  
17 Central District of California found that Plaintiffs in a  
18 parallel federal securities class action alleging the *same*  
19 *facts* as in this action adequately stated a claim under the  
20 Securities Act against these same defendants.

21 ECF No. 250-3 at 2 n.2 (emphasis added). Indeed, West Virginia copied  
22 substantial portions of the Second Amended Complaint verbatim. *See* ECF No.  
23 249 at 4-5. Thus, as BLBG acknowledged during a recent hearing in this Action, if  
24 West Virginia had filed its complaint in federal court, the parties would have

25  
26 <sup>3</sup> KSF is not involved in the State Action.

27 <sup>4</sup> The only claim alleged in West Virginia's complaint in the State Action that was  
28 not alleged in Plaintiffs' Second Amended Complaint was the so-called  
"Competition Claim," which is discussed in Section III(A), *infra*. The  
Competition Claim had been asserted in Plaintiffs' First Amended Complaint. *See*  
ECF Nos. 131 ¶¶ 140-45; 131-1 ¶¶ 176-79.

1 sought to consolidate it with this Action. Ex. A at 12:18-19.<sup>5</sup>

2 Moreover, because the claims in the State Action have the same factual  
3 predicates as those in this Action, West Virginia admitted that depositions taken in  
4 the two cases would be “substantially similar” and urged that discovery and  
5 settlement negotiations be “coordinate[d]” between the State Action and this  
6 Action. *See* Ex. B at 26:5-8, 27:1-3, 27:21-23, 37:20-25, 38:14-23.

7 On August 4, 2011, the defendants in the State Action removed that case to  
8 this Court. *See* ECF No. 250-4. West Virginia successfully moved to remand it  
9 back to the state court. Order Granting Plaintiff’s Motion to Remand this Action to  
10 State Court (“Remand Order”), *West Virginia Laborers Trust Fund v. STEC, Inc.*,  
11 No. 11-cv-1171-JVS (MLGx) (C.D. Cal. Oct. 7, 2011) (ECF No. 25). West  
12 Virginia quotes this Court’s statement in the Remand Order that “the state court  
13 can deal with [West Virginia’s case].” ECF No. 358 (W.Va.Br.) at 2. However,  
14 subsequent to its remand back to state court, the state court “dealt with” the State  
15 Action by staying it in favor of this Action, and doing so explicitly because it  
16 found that the State Action might be resolved by this Action. Ex. C at 1 (“Despite  
17 Plaintiff not being a party to the federal action, the Court finds that the issue being  
18 decided in the federal action includes Plaintiff’s claim here . . . .”).<sup>6</sup>

19 Indeed, as this Court has reasoned, this Action will likely have a preclusive  
20 effect on the State Action:

21 In this case, the Securities Act claims and the Exchange  
22 Act claims share the “same foundation of facts.” Both  
23 the Securities Act and Exchange Act claims are  
24

25  
26 <sup>5</sup> Herein, “Ex. \_\_” refers to an exhibit to the Supplemental Declaration of Richard  
T. Joffe (“Supplemental Joffe Declaration” or “Supp. Joffe Decl.”), filed herewith.

27 <sup>6</sup> West Virginia claims that it has “prosecuted the Securities Act claims since July  
28 1, 2011.” *See* ECF No. 358 (W.Va.Br.) at 4. But West Virginia has neither taken  
discovery nor survived a demurrer in the State Action. In light of its decision on  
the stay motion, the state court declined to rule on demurrers filed by the  
defendants in the State Action. Ex. C at 2.

1           predicated on Defendants' allegedly false misstatements  
2           or omissions that created an inflated impression of  
3           STEC's revenue growth and of conditions seeming to  
4           ensure short- and long-term continuation of that growth.  
5           Moreover, this Court has jurisdiction to hear both the  
6           Securities Act and Exchange Act claims. *Because claim*  
7           *preclusion prohibits Plaintiffs from subsequently*  
8           *pursuing legal theories for relief that could have been*  
9           *raised in the original litigation, the Court cannot hear*  
10          *Plaintiffs' Exchange Act claims and defer Plaintiffs'*  
11          *Securities Act claims to the state court action. In other*  
12          *words, a Class member is precluded from asserting*  
13          *Exchange Act claims in this Court and subsequently*  
14          *pursuing Securities Act claims in the West Virginia*  
15          *state action because that Class member could have*  
16          *raised the Securities Act claim in this Court.*

17 ECF No. 279 at 13 (internal citation omitted and emphasis added).<sup>7</sup>

18           However, as the Court noted in its June 19, 2012 Order granting Plaintiffs'  
19 motion for class certification with respect to the Exchange Act Claims, any  
20 concerns about the preclusive effect of this Action on the Securities Act Claims are  
21 attenuated by the fact that West Virginia or any other Securities Act Claimant  
22 could step forward as a class representative of the Securities Act Claimants in this  
23 Action (or opt out of this Action):

24                   While the Court acknowledges that certification of an  
25                   Exchange Act only Class could hypothetically preclude a

26  
27 <sup>7</sup> Trading records that West Virginia has filed with the Court appear to show that  
28 West Virginia purchased STEC common stock in the Offering but sold those  
shares on October 20, 2009. *See* ECF No. 336-2 at Ex. B. Thus, West Virginia is  
not a member of the litigation class certified by the Court (*see* ECF No. 314), but it  
is a member of the proposed settlement class (*see* ECF No. 326-1 ¶ 3).

1 class member from subsequently asserting a Securities  
2 Act claim, three considerations attenuate this concern.  
3 First, a thorough survey of the putative class has not  
4 produced a single class member with standing to bring a  
5 Securities Act claim. Thus, the Court can fairly assume  
6 that few, if any, class members will run the risk of claim  
7 preclusion. Second, *to the extent that Class notification*  
8 *reveals the identity of a class member with standing to*  
9 *assert a Securities Act claim, the Court may reexamine*  
10 *the certification issue.* Third, *if a putative class member*  
11 *has standing to assert a Securities Act claim and*  
12 *declines to represent the Class, that class member may*  
13 *opt out of the Class and pursue both claims*  
14 *individually.*

15 ECF No. 314 at 5-6 (internal citation omitted and emphasis added). That is exactly  
16 what Dr. Ripperda has done here, by (unlike West Virginia) stepping forward as a  
17 class representative for the Securities Act Claimants in this Action.

18 **D. Class Representatives Litigated and Settled the Securities Act**  
19 **Claims**

20 In January 2012, the parties participated in a mediation session with Judge  
21 Phillips. During that mediation, which was ultimately unsuccessful, Defendants  
22 made clear to Plaintiffs that Defendants would not agree to any settlement that did  
23 not resolve both the Exchange Act and Securities Act Claims. Supp. Joffe Decl. ¶  
24 31. Therefore, Plaintiffs proceeded with fact and expert discovery in this Action  
25 based on the assumption that they would have to prosecute both the Exchange Act  
26 and Securities Act Claims, and Plaintiffs did so vigorously. See ECF No. 354  
27 (Supplemental Declaration of Thomas A. Dubbs dated Dec. 14, 2012 (“Supp.  
28 Dubbs Decl.”)) ¶¶ 31-63.

As described in great detail in the Class Representatives' opening brief and supporting declarations, after the close of fact discovery and the exchange of expert reports, the parties engaged in subsequent mediations in Summer 2012. *See* ECF No. 353 at 6-7. On August 7, 2012, Defendant STEC, Inc. ("STEC") publicly disclosed that \$35 million was its "best estimate of the probable loss" resulting from the Settlement. Ex. D at 8 (STEC, Inc., Quarterly Report (Form 10-Q) (Aug. 7, 2012)). After Dr. Ripperda's counsel joined the case, reviewed discovery and concluded the settlement negotiations, STEC agreed to a total settlement amount of \$35.75 million (the "Settlement Fund"). *See* ECF Nos. 354 (Supp. Dubbs Decl.) ¶ 74; 328, Ex. 1 (Stipulation and Agreement of Settlement) ¶ 6.

Dr. Ripperda's counsel also negotiated the Plan of Allocation for the Settlement. The Plan of Allocation, which was prepared by experienced and competent counsel with the assistance of the Class Representatives' damages expert, Dr. John Finnerty, provides additional value to Securities Act Claimants by paying 125% of their Recognized Loss, while paying Exchange Act Claimants 100% of their Recognized Loss. *See* ECF No. 335 at 5.

Now, BLBG, on behalf of West Virginia, asserts an objection to the Class Representatives' motion for preliminary approval of the Settlement.<sup>8</sup>

### III. ARGUMENT

#### A. The Plan of Allocation Is Reasonable

"When formulated by competent and experienced class counsel," a plan of allocation "need only have a reasonable, rational basis." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (citation omitted). A reasonable plan may consider the relative strengths of different claims and differing positions of class members. *See In re Portal Software, Inc. Sec. Litig.*,

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<sup>8</sup> West Virginia's brief exceeds the 25-page limit set forth in Rule 11-6 of this Court's Local Civil Rules, and would grossly exceed the limit had West Virginia not also violated the Court's rule limiting footnotes to five lines. *See* ECF No. 358 at 3 n.2, 6 n.3, 10 n.7, 13 n.8-9, 19 n.11; 23 n.13-14, 24 n.15; *see also* ECF 3 ¶ K(1). As former lead counsel, BLBG should be aware of that rule.



No. C-03-5138 VRW, 2007 WL 4171201, at \*6 (N.D. Cal. Nov. 26, 2007) (“Courts endorse distributing settlement proceeds according to the relative strengths and weaknesses of the various claims.”) (collecting cases).

Here, as set forth below, it is reasonable for the Plan of Allocation to award a 25% premium to the Securities Act Claimants, subject only to the limitation that all Class Members’ recovery is capped to their out-of-pocket losses.<sup>9</sup>

**1. It Is Reasonable to Award a 25% Premium to the Securities Act Claimants**

West Virginia asserts that the 25% premium that Dr. Ripperda negotiated on behalf of the Securities Act Claimants is “arbitrary,” and implies that the Securities Act Claimants are entitled to nothing less than their “statutory measure of damages.” ECF No. 358 (W.Va.Br.) at 18. However, West Virginia also asserts (without support) that such statutory damages dwarf the total amount of the Settlement Fund. *See id.* at 7 n.4. In short, West Virginia makes no showing as to the amount of an appropriate premium.

By contrast, the Class Representatives have supported the reasonableness of the 25% premium by both expert affidavit and precedent. Dr. Finnerty examined the plans of allocation created in numerous other cases involving the settlement and release of both Exchange Act and Securities Act claims, and he opined that a premium of 25% for the Securities Act Claims is reasonable, as it represents the “median” premium granted to the Securities Act claimants in similar cases. *See* ECF No. 354-5, Ex. D.

Moreover, the Class Representatives cited numerous additional authorities supporting the 25% premium. *See* ECF No. 335 at 6 (citing class settlement notices in *In re Countrywide Fin. Corp. Sec. Litig.*, No. CV07-05295 MRP

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<sup>9</sup> In any event, West Virginia’s objections to the Plan of Allocation do not provide any reason for the Court to reject the Settlement. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 641 (5th Cir.) (dismissing objection to settlement based on revision of plan of allocation after notice was issued to class), *cert. denied*, 133 S. Ct. 317 (2012).



(MANx), at 17 (C.D. Cal. filed Aug. 14, 2007) (25% premium); *In re Waste Mgmt., Inc. Sec. Litig.*, Master File No. H-99-2183, at 11 (MH) (S.D. Tex. filed July 8, 1999) (same)); *see also* ECF No. 353 at 13 (citing class settlement notices in *In re Rait Fin. Trust Sec. Litig.*, No. 2:07-cv-03148-LDD (E.D. Pa. filed Aug. 1, 2007) (same); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-cv-1451-REB-CBS (D. Col. filed July 27, 2001) (same); *Schwartz v. TXU Corp.*, No. 02-CV-2243-K (N.D. Tex. filed Oct. 15, 2002) (same)).

***Indeed, the Class Representatives cited cases in which BLBG, on behalf of the plaintiffs, agreed to settle Securities Act claims for only a 15% premium. See*** ECF No. 353 at 14 (citing class settlement notices in *In re Isolagen, Inc. Sec. & Derivative Litig.*, MDL No. 06-md-01741 (E.D. Pa. filed Feb. 27, 2006) (15% premium); *In re SFBC Int'l Inc. Sec. & Derivative Litig.*, No. 2:06-cv-000165-SRC (D.N.J. filed Jan. 1, 2006) (same)). West Virginia does not even acknowledge these precedents.

Here, it would not be reasonable to award the Securities Act Claimants a premium greater than 25%. This is so because where, as here, the most important claims are arguably based on forward looking statements, they are less valuable for settlement purposes than Securities Act claims in other cases. As Defendants have repeatedly argued (*see* ECF Nos. 147 at 2; 184 at 14, 21), under the Private Securities Litigation Reform Act ("PSLRA"), the "safe harbor" for forward looking claims requires that plaintiffs prove defendants' knowledge of falsity, regardless whether the claims are alleged under the Exchange Act or the Securities Act. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111-12 (9th Cir. 2010) (reasoning that projections fall within the safe harbor if plaintiffs fail to prove the projections were made with actual knowledge that they were materially false or misleading); *see also In re Metro. Sec. Litig.*, No. CV-04-25-FVS, 2010 WL 424625 (E.D. Wash. Jan. 28, 2010) (same reasoning applied specifically to Securities Act claims); *In re Dynegy, Inc. Sec. Litig.*, 226 F.R.D. 263, 271 (S.D.

1 Tex. 2005) (reasoning that the PSLRA safe harbor represents “[a]n exception to the  
2 no-scienter-requirement” for Securities Act claims because “[t]o impose liability  
3 on a defendant for ‘forward-looking’ statements a plaintiff must demonstrate that  
4 the speaker or approving officer had actual knowledge of the false and misleading  
5 statement made on behalf of the corporation”). ***Thus, a key issue here is that the  
6 Securities Act Claims arguably do not have the usual advantage of such claims  
7 that scienter need not be proven.*** Cf. *In re Cendant Corp. Litig.*, 264 F.3d 201,  
8 219 (3d Cir. 2001) (affirming an order granting final approval to a class action  
9 settlement where the Securities Act claimants received no premium because the  
10 alleged Securities Act claims were “not necessarily legally stronger” than the  
11 alleged Exchange Act claims).

12 Moreover, the only claim for which West Virginia could have damages is  
13 the Competition Claim. See ECF No. 335 at 10-13.<sup>10</sup> The Competition Claim  
14 asserts that Defendants failed to disclose that competition for STEC’s flagship  
15 product would emerge before the end of 2009. Third Amended Complaint ¶¶ 187-  
16 223. The Competition Claim is forward looking, as shown by the forward looking  
17 nature of the alleged disclosure of the truth. See Third Amended Complaint ¶¶  
18 194, 371; see also ECF Nos. 335-8; 335 at 10-13.<sup>11</sup>

19 Thus, here, the proposed 25% premium is eminently reasonable.  
20  
21  
22  
23

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24 <sup>10</sup> Given the fact that, in response to multiple notices that Lead Plaintiff has issued  
25 in this Action, no Securities Act Claimant has come forward who held until the  
26 alleged November 3, 2009 corrective disclosure, ECF No. 335 at 10 n.2, it is  
unlikely that there is any significant number of Securities Act Claimants with  
Securities Act Claims other than the Competition Claim.

27 <sup>11</sup> It is permissible to settle weak class claims. See *In re Am. Int’l Grp. Inc. Sec.*  
28 *Litig.*, 689 F.3d 229, 243 (2d Cir. 2012) (reasoning that defendants are entitled to  
settle class claims “even if a court believes that those claims may be meritless”);  
see also *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 306-10 (3d Cir. 2011) (same),  
*cert. denied*, 132 S. Ct. 1876 (2012).

1                   **2. It Is Reasonable to Limit Class Members’**  
2                   **Recoveries to Their Out-of-Pocket Losses**

3           West Virginia complains that “if a Securities Act claimant’s out-of-pocket  
4           loss is less than its Recognized Loss (calculated after the premium is applied), the  
5           purported 25% premium is nullified because the Recognized Loss is then capped at  
6           the out-of-pocket loss.” ECF 358 (W.Va.Br.) at 17.

7           However, such a scenario is highly unlikely, and this methodology has  
8           repeatedly been used in plans of allocation approved in other securities class  
9           actions involving both Exchange Act and Securities Act claims *in which the*  
10          *plaintiff class was represented by BLBG*. See ECF 354-13 (class settlement notice  
11          in *SFBC*) at 7 (awarding a 15% premium to the Securities Act Claimants subject to  
12          a cap equal to their out-of-pocket loss); ECF 354-7 (class settlement notice in  
13          *RAIT*) at 10 (awarding a 25% premium to the Securities Act Claimants subject to a  
14          cap equal to their out-of-pocket loss).

15          In *In re The Mills Corp. Securities Litigation*, the Court approved a BLBG-  
16          proposed plan of allocation that not only capped both Exchange Act and Securities  
17          Act claimants’ recoveries at their out-of-pocket losses, but also provided *no*  
18          *premium* to Securities Act claimants. 265 F.R.D. 246, 258 (E.D. Va. 2009); *see*  
19          *also* Ex. E (class settlement notice in *The Mills Corp.*, No. 06-cv-00077 (E.D. Va.  
20          filed Jan. 20, 2006)).

21                   **B. Dr. Ripperda Satisfies the Adequacy Requirement**

22                   **1. West Virginia Has Not Identified Any Conflict**

23          West Virginia does not even purport to have identified any conflict between  
24          Dr. Ripperda and the other Securities Act Claimants. Indeed, the basis for Dr.  
25          Ripperda’s standing is the same as that for West Virginia. Dr. Ripperda purchased  
26          STEC stock in STEC’s August 2009 secondary offering (the “Offering”), and sold  
27          the last of his stock purchased in the Offering, for a loss, on **October 28, 2009**. See  
28          ECF No. 335-11 at Ex. 1 (Declaration of Mark V. Ripperda), Ex. A. Similarly,

1 West Virginia purchased STEC stock in the Offering, and sold the last of its stock  
2 purchased in the Offering, for a loss, on **October 20, 2009**. See ECF No. 336-2 ¶ 3  
3 & Ex. B.

4 West Virginia asserts only that “Lead Plaintiff,” *i.e.*, New Jersey, “has an  
5 insurmountable conflict of interest with those members of the class who hold  
6 Securities Act claims.” ECF No. 358 (W.Va.Br.) at 21:21-25. West Virginia’s  
7 assertion is an irrelevancy, because Plaintiffs request the appointment of Dr.  
8 Ripperda, not New Jersey, as Representative Plaintiff for the Securities Act  
9 Claimants.

10 Moreover, a representative plaintiff may be certified at any time during a  
11 class action, including in the same order that grants preliminary approval of a  
12 settlement. See Ex. F at 1-3 (Order, *Lane v. Facebook, Inc.*, No. C 08-3845 RS  
13 (N.D. Cal. Oct. 23, 2009) (ECF No. 67) (simultaneously appointing representative  
14 plaintiffs and granting preliminary approval of settlement dated September 17,  
15 2009)); *Lane v. Facebook, Inc.*, 696 F.3d 811, 816-17, 826 (9th Cir. 2012)  
16 (affirming final approval of settlement “finalized” in September 2009).

17 **2. West Virginia Has Not Identified Any Lack of**  
18 **Prosecutorial Vigor**

19 **(a) Discovery Regarding the Securities Act Claims**

20 In *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1237-40 (9th Cir.  
21 1998), the Ninth Circuit affirmed certification of a settlement class, despite the fact  
22 that class counsel who negotiated the settlement took no formal discovery, and  
23 relied on the work product of a previous class counsel held to have had a conflict  
24 of interest with the class. That the counsel who negotiated the settlement relied on  
25 the work product of former, conflicted counsel was held to be of no significance,  
26 “where the parties have sufficient information to make an informed decision.” *Id.*  
27 at 1239.  
28

1 West Virginia tries to distinguish *Linney* on the ground that, in *Linney*, even  
2 though the key attorney work product was that of a prior, conflicted counsel, “there  
3 was a representative with standing” throughout the case. ECF No. 358 (W.Va.Br.)  
4 at 22:20-21. However, the standing of the representative plaintiff during the period  
5 when the work was being done by a conflicted counsel cannot have mattered in  
6 *Linney*, because, among other reasons, the *Linney* court never considered whether  
7 the representative plaintiff ever had standing. What did matter in *Linney* was that,  
8 just like here, the objectors “do not demonstrate that the work product on which  
9 new class counsel relied was inadequate.” *Linney*, 151 F.3d at 1239.

10 Moreover, in *Linney*, the “new class counsel” who negotiated the settlement  
11 included Robert S. Green, then a member of the law firm Girard & Green, and now  
12 one of the two counsel for Dr. Ripperda. *Compare Linney v. Cellular Alaska*  
13 *P’ship*, 1997 WL 450064, at \*1 (N.D. Cal. July 8, 1997) (listing Robert S. Green  
14 among the counsel for the plaintiff class), *with Linney*, 151 F.3d at 1238 (listing the  
15 law firm Girard & Green as one of the two “new class counsel”). In *Linney*,  
16 where Green and the other “new class counsel” negotiated a settlement based on  
17 the work product of former, conflicted counsel, the Ninth Circuit, after a lengthy  
18 analysis, specifically affirmed the district court’s holding that the representation  
19 provided by Green and his co-counsel had been “adequate” under Rule 23(a).  
20 *Linney*, 151 F.3d at 1238-41.

21 **(i) Circumstances Surrounding the Offering**

22 In its opposition to the Class Representatives’ renewed motion for  
23 preliminary approval of the Settlement, for the first time, West Virginia identifies  
24 the following aspect of discovery as supposedly having been inadequate:

25 discovery and expert reports apparently largely did not  
26 address the Offering and issues unique to the Securities  
27 Act claims. [T]here apparently was little or no scrutiny  
28 of the circumstances surrounding the Offering by

1 Manouch Moshayedi or Mark Moshayedi of nine million  
2 shares of their own stock, for a total of \$267.8 million, at  
3 the same time they were making false statements to  
4 investors.

5 ECF No. 358 (W.Va.Br.) at 10:5-14. This vague assertion by West Virginia is (1)  
6 unsupported, (2) false about Plaintiffs' discovery, and (3) false about the supposed  
7 unique relevance of this issue to the Securities Act claims.

8 First, West Virginia cites no evidence in support of its assertion.

9 Second, the assertion regarding Plaintiffs' discovery is false. Although  
10 discovery was comprehensive and focused on many issues, it focused on no group  
11 of issues more thoroughly than the group that included the nature of the Offering  
12 and how it compared to the Moshayedis' history of trading, the Moshayedis'  
13 motivations for the Offering, the process by which the Offering was approved, the  
14 essential simultaneity of the Offering with the alleged misstatements and material  
15 omissions, the specifics of the alleged misstatements and material omissions—  
16 which were made primarily in the Registration Statement and Prospectus, and in  
17 the Form 10-Q incorporated into the Registration Statement and Prospectus—and  
18 Defendants' knowledge at the time of the Offering that their statements were false  
19 and their omissions were material. *See* Supp. Joffe Decl. ¶¶ 11-26.

20 Third, West Virginia's assertion that it is an issue "unique to the Securities  
21 Act claims" that Defendants were selling their stock "at the same time they were  
22 making false statements to investors" also is wrong. The simultaneity of a  
23 defendant's false statements and insider stock sales is the *sine qua non* of some of  
24 the strongest cases for scienter under the Exchange Act. *See, e.g., Nursing Home*  
25 *Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1227, 1232 (9th Cir.  
26 2004) (in a case alleging claims solely under the Exchange Act, holding that  
27 suspicious insider stock sales "support a strong inference of scienter," based on  
28



1 “(1) the amount and percentage of shares sold; (2) timing of the sales; and (3)  
2 consistency with prior trading history”).

3 Indeed, as the Court has recognized, “[i]n this case the Securities Act claims  
4 and the Exchange Act claims share the ‘same foundation of facts.’” ECF No. 279  
5 at 13. Therefore, even if discovery had been aimed solely at the Exchange Act  
6 Claims, the result still would have been a vigorous discovery of the Securities Act  
7 Claims. As the court held in *In re U.S. Financial, Inc. Securities Litigation*, 64  
8 F.R.D. 443, 454 (S.D. Cal. 1974),

9 the broader Section 10(b) action encompasses the  
10 misrepresentations and omissions in the registration  
11 statement, which form the basis of the Section 11 action.  
12 [Therefore,] the Section 11 violation, if it exists, will be  
13 proved in the course of proving the Section 10(b)  
14 violation, if it exists.

15 **(ii) The Underwriters’ Due Diligence**

16 As West Virginia did in its prior brief—filed in opposition to the Class  
17 Representatives’ initial motion for preliminary approval—West Virginia again  
18 suggests that Plaintiffs’ discovery should have focused more on the due diligence  
19 defense of the underwriters of the Offering (the “Underwriters”). *Compare* ECF  
20 No. 333 at 8-9, *with* ECF No. 358 (W.Va.Br.) at 10:7-10 & n.7. West Virginia is  
21 wrong about both the extent of Plaintiffs’ discovery regarding the Underwriters’  
22 defense, and the relative importance of this defense to the Securities Act  
23 Claimants’ case.

24 First, Plaintiffs took extensive discovery regarding the Underwriters’ due  
25 diligence defense. Plaintiffs obtained and reviewed document productions by all  
26 four Underwriters, including a total of 668,105 pages produced by the two lead  
27 underwriters, and a total of 63,876 pages produced by the other two Underwriters.  
28



1 These productions included all of the due diligence documents produced by the  
2 Underwriters to the SEC, and the Commitment Committee memoranda that each  
3 firm drafted in connection with the Offering, describing, among other things, the  
4 due diligence procedures performed by each Underwriter. *See* ECF No. 354  
5 (Supp. Dubbs Decl.) ¶¶ 60-61. Plaintiffs also deposed a financial analyst for one  
6 of the two lead Underwriters who was part of that Underwriter's engagement team  
7 for the Offering. *Id.* ¶ 62. During that deposition both Plaintiffs and Defendants  
8 questioned the deponent specifically about, among other things, due diligence for  
9 the Offering. *Id.*

10 Second, West Virginia is wrong to suggest that the only reasonable way to  
11 conduct discovery of Securities Act Claims is by focusing on the Underwriters'  
12 due diligence defense, rather than on the issuer's liability. As the Class  
13 Representatives previously explained, as a matter of law, if STEC were to be found  
14 liable under the Securities Act, it would be liable for the entirety of the Securities  
15 Act damages; therefore, proving the liability of the Underwriters would add  
16 nothing to the Securities Act Claimants' damages. *See* ECF No. 335 at 15:11-17.  
17 Moreover, it is easier to prove an issuer's liability than an underwriter's liability,  
18 because, as a matter of law, the issuer has no due diligence defense. *Id.* at 15:18-  
19 25.

20 The greater difficulty of proving an underwriter's liability than an issuer's  
21 liability is even more pronounced than usual in this Action, because the central  
22 alleged false statement—the omission to disclose that the EMC Agreement was a  
23 “one-off” deal—arguably was a forward looking omission that was false only to  
24 the extent that the STEC Defendants *knew* that the contract would not be renewed.  
25 *See* ECF No. 200 at 10-19 (Order, denying, in part, motion to dismiss the Second  
26 Amended Complaint, discussing this allegation as the central allegation in the  
27 Complaint, and assuming, for the purpose of analyzing the applicability of the safe  
28 harbor, that the omission was forward looking). It is difficult enough to prove an

1 issuer's knowledge; it is doubly difficult to prove that underwriters had knowledge  
2 of an issuer's knowledge.

3 Indeed, it is an indication of the vigor of Plaintiffs' prosecution of the  
4 Securities Act Claims that Plaintiffs did conduct discovery even into that doubly  
5 difficult, and arguably superfluous, issue—the Underwriters' knowledge of  
6 STEC's knowledge. Thus, a key piece of evidence of the STEC Defendants'  
7 knowledge of the falsity of their omission regarding the EMC Agreement, obtained  
8 through discovery, was an e-mail received by Defendant Manouch Moshayedi  
9 from an EMC employee just hours before STEC issued the Prospectus, in which  
10 the EMC employee stated "I think I can say with a high degree of confidence that  
11 our most recent . . . volume commitment deal will be our last."<sup>12</sup> During the  
12 deposition of Manouch Moshayedi, Plaintiffs' attorney specifically asked Mr.  
13 Moshayedi "did you tell the underwriters about this e-mail?" Supp. Joffe Decl. ¶  
14 27. Mr. Moshayedi responded that he did *not* tell the Underwriters. *Id.*

15 **(iii) Other Subjects of Discovery**

16 West Virginia argues that Plaintiffs' Co-Lead Counsel "admitted in open  
17 court that discovery would have been conducted differently" if there had been  
18 Securities Act claims in the Action. ECF No. 358 (W.Va.Br.) at 10. Contrary to  
19 West Virginia's assertion, the statement they quote—that Securities Act claims  
20 would require different discovery—was made *before* discovery had commenced, at  
21 a time when Plaintiffs were focused on looking for a Securities Act plaintiff.  
22 *Compare id.* (citing transcript dated October 7, 2011), *with* ECF No. 216 (Order,  
23 dated October 24, 2011, setting out rules for discovery requests and depositions,  
24 and setting discovery cut-off date).

25 Once it became clear that discovery would go forward, Plaintiffs determined  
26 to leave no potentially relevant issue uninvestigated, including those relating solely

27  
28 <sup>12</sup> This e-mail and its contents were publicly disclosed in the complaint filed in this  
Court against Manouch Moshayedi by the SEC. *See* Ex. G (Complaint ¶ 69, *SEC*  
*v. Moshayedi*, No. 12-cv-01179-JVS-MLG (C.D. Cal. July 19, 2012) (ECF No. 1)).

1 to the Securities Act Claims. Plaintiffs did so because, among other reasons, they  
2 continued with their attempts to identify a Securities Act representative plaintiff,  
3 *see* ECF Nos. 354 (Supp. Dubbs Decl.) ¶¶ 35-44; 335 at 14:9-17, and because,  
4 during the first mediation—which took place before the commencement of the  
5 depositions—Defendants communicated that they would not settle unless the  
6 Securities Act Claims were included in the settlement, *see* Supp. Joffe Decl. ¶ 31.  
7 Thus, as demonstrated, *supra*, Plaintiffs took discovery regarding the  
8 Underwriters’ due diligence defense. Thus too, Plaintiffs served an expert report  
9 devoted in part to an allegation in the Complaint alleged only under the Securities  
10 Act—namely, that disclosure of the one-off nature of the EMC Agreement had  
11 been required by the SEC’s Regulation S-K, even if it had *not* been required by the  
12 nature of the affirmative statements that Defendants had made about the EMC  
13 Agreement—the latter requirement being one alleged under *both* the Securities Act  
14 *and* the Exchange Act. *See* ECF No. 335 at 14:18-15:5.

15 Similarly, Plaintiffs took vigorous discovery regarding the Competition  
16 Claim. *See* ECF No. 354 (Supp. Dubbs Decl.) ¶¶ 51-56; Supp. Joffe Decl. ¶¶ 28-  
17 29. Plaintiffs had multiple reasons to do so, including that (1) the facts relevant to  
18 the Competition Claim also are relevant to the EMC Agreement claim, *see* ECF  
19 No. 335-1 ¶ 11, (2) if supported by evidence obtained during discovery, Plaintiffs  
20 could have sought leave to re-allege the Competition Claim prior to any motions  
21 for summary judgment, (3) dismissal of the claim could be appealed after  
22 judgment, and (4) even a dismissed claim may be worth something in a settlement.

23 **(b) Negotiations on Behalf of the Securities Act Claims**

24 West Virginia asserts that Dr. Ripperda’s representation of the Securities Act  
25 Claimants cannot have been adequate because the Plan of Allocation was not  
26 negotiated until after the parties had agreed to the Settlement. *See* ECF No. 358  
27 (W.Va.Br.) at 16. West Virginia cites no authority for this proposition.  
28

1 In fact, contrary to West Virginia's assertion, negotiation of a plan of  
2 allocation after a settlement agreement has been executed, and without any  
3 participation by defendants in the negotiation of the plan of allocation, is common,  
4 and entirely appropriate, in securities class actions. *See, e.g., Class Plaintiffs v.*  
5 *City of Seattle*, 955 F.2d 1268, 1273, 1275-76, 1296 (9th Cir. 1992) (affirming  
6 approval of settlement agreement and plan of allocation in securities litigation  
7 where approval of the settlement agreement had been certified as a final judgment  
8 on February 27, 1990, and the plan of allocation, negotiated thereafter solely  
9 between counsel for two sets of plaintiffs, had not been approved until September  
10 21, 1990—seven months after certification of the district court's approval of the  
11 settlement as a final judgment).

12 West Virginia also asserts that Dr. Ripperda cannot have been adequate  
13 because the Settlement "was largely agreed to" without his involvement. This  
14 assertion too is wrong—for each of several reasons.

15 First, "[n]othing in Rule 23 requires that subclass counsel fight among one  
16 another or attend every negotiation session in attempting to work out a global  
17 settlement." *In re Diet Drugs Prods. Liability Litig.*, Nos. 1203, 99-20593, 2000  
18 WL 1222042, at \*51 (E.D. Pa. Aug. 28, 2000). Indeed, so far as maximizing the  
19 recovery from Defendants is concerned—as distinct from achieving a fair plan of  
20 allocation among Class Members—representative plaintiffs for both the Exchange  
21 Act Claims and the Securities Act Claims have a common interest.

22 Even so, as Robert S. Green, one of Dr. Ripperda's two attorneys has  
23 explained, when Ripperda's attorneys joined the negotiation, they acted with  
24 appropriate independence:

25 Mr. Bienert and I approached the mediation with two  
26 goals in mind. First, we wanted to maximize the amount  
27 of money that Defendants would pay to obtain a release  
28 of claims that included the Section 11 claims. Second,

1 we wanted to maximize the allocation to Section 11  
2 claimants out of the settlement fund that was created. At  
3 the mediation on September 5, 2012, we maintained  
4 separation from both the Lead Plaintiffs counsel and  
5 Defendant's counsel, working separately with the  
6 mediators to advance these two goals and conducting our  
7 own joint sessions with Defendants' counsel and then  
8 with Lead Plaintiff's counsel as deemed appropriate with  
9 the mediators. At the end of the day, we did not accept  
10 the amount that was offered by Defendants and further  
11 negotiations were required to reach an amount that was  
12 acceptable to us, as well as Lead Plaintiff's counsel.

13 ECF No. 354-2 ¶ 11.

14 Moreover, the participation of Dr. Ripperda, through his counsel, had a  
15 positive effect on the amount of the Settlement Fund. Thus, before Dr. Ripperda  
16 and his counsel became involved in the negotiations, STEC stated in its Form 10-Q  
17 filed on August 7, 2012, that "the Company's best estimate of the probable loss"  
18 from a settlement with Plaintiffs was only \$35 million. *See* Ex. D. However, after  
19 the participation of Ripperda and his counsel in the remaining negotiations,  
20 Defendants agreed to provide a \$35.75 million Settlement Fund.

21 Second, where, as here, the purpose of appointing a Securities Act  
22 representative plaintiff is so that Securities Act Claimants will have "the benefit of  
23 the lesser burden of proof required by the Securities Act claims," ECF No. 279  
24 at 14, vigorous negotiation of the plan of allocation is a crucial metric of the  
25 adequacy of the Securities Act representative plaintiff.

26 Dr. Ripperda's counsel participated in negotiations assisted by Judge Philips  
27 regarding the Plan of Allocation of the Settlement Fund between the Exchange Act  
28 Claimants and the Securities Act Claimants. *See* ECF Nos. 354-2 ¶¶ 12-15; 354

¶¶ 75-76; 354-4 ¶¶ 9-10. Indeed, during those negotiations, it was Dr. Ripperda's counsel who suggested the amount of the premium for the Securities Act Claims that ultimately was agreed to by New Jersey and Dr. Ripperda. *See* ECF No. 354 (Supp. Dubbs Decl.) ¶ 76.

Third, the fact that a class representative has secured appropriate relief for class members that he represents indicates that the adequacy requirement has been satisfied. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (objection to adequacy "is particularly weak in light of the fact that the class representatives have been so successful in their efforts to obtain relief for the entire class"); *Moralez v. Whole Foods Market, Inc.*, No. C12-01072(CRB), 2012 WL 4369603, at \*11 (N.D. Cal. Sept. 24, 2012) (holding class settlement release preclusive because representation was adequate where class members were compensated appropriately, and "nothing suggests that [class member wishing to bring her own suit] could or would secure—apart from her own incentive award and attorneys' fees—any different or better resolution of the claims while avoiding the uncertainties of trial").

Here, the Court already has held that, "[t]he size of the Settlement speaks for itself," as a reason to submit the proposed Settlement to the Class. ECF No. 346 at 13. In addition, as demonstrated, *supra*, the allocation between the Securities Act Claims and Exchange Act Claims is fair to both kinds of claims.

### **C. The Securities Act Claims May Be Released by the Settlement**

The factual predicate of every Securities Act claim released by the Settlement was pled in the Second Amended Complaint, *see* ECF No. 279 at 13 ("in this case the Securities Act claims and the Exchange Act claims share the 'same foundation of facts'"), or the First Amended Complaint, ECF No. 131-1 ¶¶ 140, 176-79. Moreover, "the released claims need not be exactly factually and legally identical to the allegations in the complaint; rather, they need only share a common factual predicate." *Anderson v. Nextel Retail Stores, LLC*, Nos. CV 07-



1 4480, 6362, 6576-SVW (FFMx), 2010 WL 8591002, at \*6 (C.D. Cal. Apr. 12,  
2 2010); *see also Class Plaintiffs*, 955 F.2d at 1288 (holding claims pled and claims  
3 released need only share “the same common nucleus of operative fact”).

4 In addition, as demonstrated, *supra*, each of the Securities Act Claims  
5 released by the Settlement has been prosecuted with appropriate vigor. *See*  
6 *Anderson*, 2010 WL 8591002, at \*14 (“counsel is required to be adequate, not  
7 perfect”). As also demonstrated, *supra*, the Securities Act Claims have been  
8 settled with the vigorous involvement of a proposed representative—Dr.  
9 Ripperda—who has no conflict with the other Securities Act Claimants.

10 Moreover, a complaint may be amended to add a representative plaintiff,  
11 even after the parties have agreed to a settlement. *See* Ex. H at 1 (Pls’ Br.,  
12 *Vallabhapurapu v. Burger King Corp.* (“*Vallabhapurapu*”), No. C 11-00667-WHA  
13 (N.D. Cal. June 14, 2012) (ECF No. 219)) (explaining amendment was needed in  
14 order to have a representative plaintiff for “each subclass,” “to effectuate a global  
15 settlement reached by the parties”); *Vallabhapurapu*, 2012 WL 2568183, at \*1  
16 (N.D. Cal. July 2, 2012) (granting class certification, based on amendment);  
17 *Vallabhapurapu*, 2012 WL 5349389, at \*4-5 (N.D. Cal. Oct. 29, 2012) (approving  
18 settlement).

19 **D. The Claims in State Court May Be Released Despite the Exclusion**  
20 **of State Court Class Counsel from the Settlement Process**

21 The Ninth Circuit has held that claims alleged in state court may be released  
22 by a settlement in federal court, despite the exclusion of the state court class  
23 counsel from the settlement process. *Class Plaintiffs*, 955 F.2d at 1286-88, 1291  
24 (affirming release of claims pled in state court because counsel who negotiated the  
25 settlement in federal court represented the “same group of [claimants]” and was  
26 “intimately familiar with the [relevant] facts and law”).

27 Therefore, the Securities Act Claims may be released by the Settlement.<sup>13</sup>

28 <sup>13</sup> As previously explained, *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010),  
relied on by West Virginia, is nothing like this case. *See* ECF No. 335 at 16 n.4



1           **E.     Only With the Certification of Dr. Ripperda,**  
2                       **Will the Securities Act Claimants Be Assured of Relief**

3           West Virginia asserts that Plaintiffs' purpose in adding Dr. Ripperda to this  
4 action is *solely* so that the Securities Act Claims can be released. *See* ECF No. 358  
5 (W.Va.Br.) at 23:5-6. Contrary to West Virginia's assertion, the addition of Dr.  
6 Ripperda as a representative plaintiff gives Securities Act Claimants an  
7 opportunity to share in the Settlement Fund, and even to receive a premium  
8 relative to other participants in the Fund. It is only reasonable that, in order for  
9 Securities Act Claimants to so benefit, they be required to release their claims.  
10 Even after Dr. Ripperda has been certified as their representative, if the Securities  
11 Act Claimants do not wish to make such a trade-off, they will be able to opt out.

12           If, on the other hand, Securities Act Claimants are excluded from the  
13 Settlement, there is a risk that they will never be able to obtain *any* relief, because  
14 the State Action has not yet survived Defendants' demurrers to the complaint, and  
15 has never been certified as a class action.

16           **F.     The Amended Proposed Notice Discloses the Attorneys' Fees**  
17                       **Sought by Counsel, Including BLBG**

18           Co-Lead Counsel's fee is subject to a fee agreement with New Jersey, as  
19 well as Court review and approval. The combined fee requested by Co-Lead  
20 Counsel, Dr. Ripperda's counsel and KSF will not exceed 16.75% of the  
21 Settlement Fund. Should the Court award attorneys' fees of 16.75%, such an  
22 award would represent a significant negative lodestar multiplier for Co-Lead  
23 Counsel. In other words, Co-Lead Counsel will recover a small fraction of their  
24 total lodestar.

25           BLBG and KSF requested that Co-Lead Counsel add language to the notice  
26 regarding their respective requests for fees. After negotiations, KSF agreed to  
27 accept the same negative lodestar multiplier as Co-Lead Counsel. However,  
28 BLBG has indicated that it will seek compensation for the *full* amount of the  
lodestar that it has accumulated in connection with its representation of: 1) former

1 co-lead plaintiffs Rashtchi and Ovitt in this Action *and* 2) West Virginia in the  
2 State Action. BLBG states that its fee will not exceed \$2.6 million, or  
3 approximately 7.27% of the Settlement Fund. Accordingly, at the request of  
4 BLBG, Plaintiffs' Counsel has added several paragraphs explaining this issue to  
5 the current proposed Notice, which is attached as Exhibit I to the Supplemental  
6 Joffe Declaration. *See* Ex. I at 6-7, 21-23.<sup>14</sup>

7 **CONCLUSION**

8 For the reasons set forth above, West Virginia's objection should be  
9 rejected.

10  
11 Dated: January 25, 2012

Respectfully submitted,

12 LABATON SUCHAROW LLP

13  
14 /s/ Thomas A. Dubbs

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21 -and-

22  
23  
24  
25  
26  
27  
28 <sup>14</sup> Although New Jersey has agreed to provide Class Members with notice of  
BLBG's fee request in the Amended Proposed Notice, New Jersey has expressly  
reserved the right to oppose that request. *See* Ex. I at 23.

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